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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	)	IB Docket No. 96-111
	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	CC Docket No. 93-23 RM-7931
	)	
COMMUNICATIONS SATELLITE CORPORATION	)	File No. ISP-92-007
	)	
Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the INTELSAT K Satellite	)	

OPPOSITION OF THE BOEING COMPANY

The Boeing Company ("Boeing"), by its attorneys and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby opposes the Petition for Clarification and Reconsideration of ICO Global Communications ("ICO") in the above-captioned proceeding (hereinafter "DISCO II").[1]

[1] *Petition for Clarification and Reconsideration of ICO Global Communications*, IB Docket No. 96-111 (Jan. 5, 1998) ("*ICO Petition*").

I. INTRODUCTION

Boeing is a global leader in space and satellite technology, providing design, construction and launch services for numerous government and commercial systems. Boeing also has pending before the Commission an application to launch and operate a medium earth orbit ("MEO") satellite system in the 2 GHz spectrum band to provide global air traffic communications services to aircraft.[2] Because of Boeing's substantial involvement in space technology, Boeing strongly supports the Commission's goal to "foster development of innovative satellite communications services for U.S. consumers through fair and vigorous competition among multiple service providers, including foreign-licensed satellites."[3]

Boeing believes that the rules and procedures adopted in the DISCO II proceeding aid significantly in achieving the Commission's goals. The Commission's rules implement the U.S. commitments under the World Trade Organization ("WTO") Group of Basic Telecommunications ("GBT") agreement by establishing a presumption that entry by WTO Member satellite systems will promote competition in the U.S. satellite services market. At the same time, the Commission appropriately exercised its authority under the U.S. Regulatory Reference Paper by adopting those measures minimally necessary to constrain the potential for anticompetitive harm in the U.S. market. The

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[2] *See* Application for Authority to Construct, Launch and Operate a Non-Geosynchronous Satellite System in the 2 GHz Mobile-Satellite Service and the Aeronautical Radionavigation-Satellite Service, FCC File No. 179-SAT-P/LA-97 (Sept. 26, 1997).

[3] *Amendment to the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, FCC 97-399, ¶ 6 (Nov. 26, 1997) ("*DISCO II Order*").

Commission reserved the right to place conditions on entry by non-U.S. systems and, "in the exceptional case in which grant would pose a very high risk that cannot be cured by conditions placed on the license," to deny an application.[4]

The Commission also adopted competitively neutral procedures for entry into the U.S. market. Foreign-licensed satellite systems may gain access through the filing of an earth station license application, or a letter of intent to serve the U.S. market. While the Commission declined to re-license non-U.S. operators, the Commission appropriately required non-U.S. systems to demonstrate compliance with the same technical, financial and legal rules applicable to U.S.-licensed systems. Compliance with the Commission's space station rules is necessary to encourage spectrum efficiency and protect existing operators. Thus, the Commission should reject efforts that could enable non-U.S. systems to circumvent the Commission's competitively neutral requirements.

II. THE COMMISSION WAS CORRECT IN CONCLUDING THAT NON-U.S. LICENSED SATELLITES MUST DEMONSTRATE COMPLIANCE WITH U.S. LEGAL, FINANCIAL AND TECHNICAL RULES.

As the Commission noted in its Order, the rules adopted in the DISCO II proceeding benefited from the contributions of more than 100 comments from parties from around the world. Stemming from a pro-competitive idea referenced in the Commission's 1996 DISCO I Order,[5] the market entry procedures adopted in DISCO II are carefully crafted to enable open entry into the U.S. market, while adequately protecting consumers from anticompetitive conditions.

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[4] *Id.*, ¶ 67.

[5] *See Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, 11 FCC Rcd 2429, 2437 n.68 (Jan. 22, 1996).

Throughout the DISCO II proceeding, the Commission repeatedly made clear that, in order to safeguard competition, non-U.S. systems would be required to comply with the same technical, financial and legal requirements applicable to U.S. systems.[6] As the Commission noted in the first Notice of Proposed Rulemaking ("NPRM"), without such rules in place non-U.S. systems "would distort our competitive policies, disadvantage U.S. satellite operators and service providers, and jeopardize our spectrum management policies."[7]

Despite these valid concerns, ICO filed a petition for reconsideration of the DISCO II Order urging the Commission to disregard application of its rules to foreign-licensed satellites, or require a demonstration of compliance only in the face of "clear evidence" that a foreign system is not subject to such rules in its home country.[8] ICO argued that documenting compliance with the Commission's technical, financial and legal rules would pose a needless "regulatory burden" for non-U.S. licensed systems and therefore should be eliminated.[9]

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[6] *See Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, FCC 96-210, ¶¶ 53, 61 (May 14, 1996) ("*DISCO II NPRM*").

[7] *Id.*, ¶ 53.

[8] *ICO Petition* at 3-4. In its petition, ICO also disputes the Commission's conclusion that ICO is an affiliate of an intergovernmental organization ("IGO") because it was created by INMARSAT and because INMARSAT maintains an ownership interest in the company. *See ICO Petition* at 6-7. As the Commission has previously noted, the issue is under examination in a companion proceeding. *See DISCO II NPRM*, ¶ 71 n.52 (citing to *Application of Comsat Corp. for Authority to Participate in the Procurement of Facilities of the ICO Global Communications Limited System*, FCC File No. 106-SAT-MISC-95 (May 10, 1995)). Thus, the Commission should reject ICO's petition to the extent that it addresses this issue.

[9] *ICO Petition* at 3-4.

In seeking a blanket exception for non-U.S. systems, ICO is attempting to marginalize the Commission's regulatory authority by exempting itself from the rulemaking process for new satellite services, such as the 2 GHz Mobile-Satellite Service.[10] Such disparate treatment would thwart U.S. National Treatment ("NT") commitments by providing foreign systems with more lenient market entry procedures than those available to domestic systems. U.S.-licensed operators would have a strong incentive to bypass the Commission's rules by obtaining licenses from foreign administrations that lack significant regulatory safeguards. Furthermore, any attempt by the Commission to selectively apply its satellite rules only to some non-U.S. systems, based on the regulatory regimes of their home countries, would almost certainly violate U.S. Most Favored Nation ("MFN") commitments.

Boeing is of the view that the Commission was correct in requiring all non-U.S. systems to demonstrate compliance with its rules. As the Commission noted in its Order, technical requirements exist to prevent unacceptable interference with existing systems and to ensure that orbital and spectrum resources are used efficiently.[11] This is especially the case with respect to the Commission's spectrum coordination requirements, which legitimately supplement, rather than duplicate, the ITU's coordination procedures. The Commission's financial requirements also encourage spectrum efficiency, while its legal

[10] *See 2 GHz Mobile-Satellite Service*, First Report and Order and Further Notice of Proposed Rule Making, FCC 97-93 (Mar. 14, 1997).

[11] *See DISCO II Order* at 155.

requirements ensure compliance with the Commission's statutory directive that the use of spectrum resources promote the public interest.[12]

Because of the importance of the Commission's technical, financial and legal rules, the Commission should reject arguments that non-U.S. systems should be exempt from demonstrating compliance. Furthermore, the Commission should not limit its reporting requirements to cases in which "clear evidence" is presented that non-U.S. systems do not face similar rules in their countries of origin. Such an evidentiary obligation would create a tremendous administrative burden for the Commission's staff, by forcing the International Bureau to develop and maintain detailed records on the licensing rules for every WTO Member country that authorizes satellites.

In contrast, requiring non-U.S. systems to demonstrate compliance with U.S. rules poses minimal inconvenience for non-U.S. operators. This is particularly the case for non-U.S. systems subject to foreign licensing regimes comparable to the United States, since such non-U.S. systems are likely to have previously documented much of the relevant information. In any event, any administrative inconvenience experienced by non-U.S. operators will be identical to the regulatory obligations of U.S. licensees. Thus, enforcement of the Commission's technical, financial and legal rules is fully consistent with U.S. NT and MFN obligations pursuant to the WTO GBT agreement.

[12] *See id.*

III. THE COMMISSION WAS CORRECT IN CONCLUDING THAT A NUMBER OF FACTORS ARE RELEVANT IN IDENTIFYING VERY HIGH RISKS TO COMPETITION.

In its petition, ICO attempts through "clarification" to significantly constrain the Commission's ability to detect and respond to very high risks to competition in the U.S. market. In doing so, ICO is once again attempting to misuse the NT doctrine, by giving foreign-licensed satellites access rights into the U.S. market that are more favorable than those available to domestic systems.

Specifically, ICO reiterates its prior position that "the Commission may not limit entry to the U.S. market for competitive reasons except through application of the same antitrust principles that apply to U.S. operators."[13] The Commission considered and rejected ICO's argument in the DISCO II Order, where the Commission concluded that a number of factors might be relevant in determining whether a foreign application should be denied as a threat to competition.[14] For example, the Commission observed that adjudicated violations of the Commission's rules, or fraudulent or criminal conduct may indicate that an entity is likely to evade the Commission's rules and "thus may pose a very high risk to competition."[15] Furthermore, the Commission concluded that competitive concerns may be raised by market concentration, discrimination, below average variable cost pricing, or monopoly supply of service.[16]

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[13] *ICO Petition* at 8 (citing *Further Comments of ICO Global Communications*, IB Docket No. 96-111, at 7-10 (Aug. 21, 1997)).

[14] *See DISCO II Order*, ¶¶ 41-43, 136.

[15] *Id.*, ¶ 42.

[16] *Id.*, ¶ 41.

With respect to these final examples, ICO is incorrect in claiming that the Commission created a "two-part test" by requiring an additional showing that an applicant will "use market power to 'raise prices and limit output in the U.S. satellite market.'"[17] The Commission clearly indicated in the DISCO II Order that any one of the above factors, or a potential misuse of market power, could raise competitive concerns.

The clarity of the Commission's conclusion is apparent in that section of the Order addressing U.S. entry by IGO affiliates such as ICO. The Commission provided a detailed list of factors relevant to determining whether U.S. entry poses a very high risk to competition, including the relationship between an affiliate and its parent, the potential for collusive behavior or cross-subsidization, and whether the affiliate can benefit from an IGO's privileges and immunities.[18] Importantly, at no point in the discussion did the Commission suggest that an additional showing of misuse of market power is necessary to find a very high risk to competition, a fact that ICO conspicuously failed to dispute in its petition. Thus, the Commission should decline to reconsider its conclusions that a variety of factors are relevant in assessing risks to competition and that each can be considered by the Commission consistent with U.S. WTO commitments.

[17] *ICO Petition* at 8 (quoting *DISCO II Order*, ¶ 41).

[18] *See DISCO II Order*, ¶ 136.

IV. CONCLUSION

For the reasons discussed above, the Commission should reaffirm its DISCO II rules by denying the Petition for Clarification and Reconsideration of ICO Global Communications.

Respectfully submitted,

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February 17, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to the Petition for Clarification and Reconsideration of ICO Global Communications was sent this 17th day of February, 1998, via hand delivery, to the following:

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